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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92056317
Party	Defendant Top Gun Intellectual Properties, LLC
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Submission	Motion to Dismiss - Rule 12(b)
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Attachments	Top Gun Motion to Dismiss.pdf (10 pages)(469183 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

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COCKPIT USA, INC.,)	
)	
Petitioner,)	Cancellation No. 92056317
)	Registration No. 2817325
v.)	
)	
TOP GUN INTELLECTUAL)	
PROPERTIES, LLC,)	
)	
Registrant.)	
<hr/>)	

**REGISTRANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON
WHICH RELIEF CAN BE GRANTED AND BRIEF IN SUPPORT THEREOF**

Pursuant to 37 C.F.R. §2.127, Rule 12(b)(6) of the Federal Rules of Civil Procedure, and TBMP 503, Registrant Top Gun Intellectual Properties, LLC hereby moves to dismiss the Petition for Cancellation ("Petition") filed by Petitioner Cockpit USA, Inc., for failure to state a claim upon which relief can be granted.

The grounds for the motion are set forth more fully in Registrant's brief in support of the motion, which is embodied herein pursuant to 37 C.F.R. §2.127(a).

FACTS

Registrant is the owner, by assignment, of Registration No. 2,817,325, issued February 24, 2004, for the mark TOP GUN, for footwear, shoes, sandals; clothing, namely, leather jackets, sport coats, jeans, sweatshirts, T-shirts, caps, hats, belts, and excluding protective clothing and working gloves. A Notice of Acceptance and Acknowledgment of §§8 & 15 Declaration was mailed September 23, 2009.

ARGUMENT

Petitioner seeks cancellation of the subject registration for the mark TOP GUN based on allegations of fraud or, in the alternative, on the grounds that the TOP GUN mark is generic of leather jackets. Both claims fail to state a claim upon which relief can be granted, as the Petition fails to allege facts, which even if proven, would establish that Petitioner has a right to the relief sought. In short, the claims fail as a matter of law. Furthermore, the fraud claims fail to meet the heightened pleading requirements of Rule 9(b) Fed. R. Civ. P.

1. Legal Standards Applicable to a Motion to Dismiss Under Rule 12(b)(6)

To survive a motion to dismiss under Rule 12(b)(6), the factual allegations in a complaint must be enough to raise a right to relief above the speculative level, on the assumption that any well-pleaded allegations are true. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Thus, what is required are “enough facts to state a claim to relief that is plausible on its face.” Id. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). “Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct,” dismissal is appropriate. Id. at 1950.

Additionally, in petitioning to cancel on the ground of fraud, a petitioner must allege the elements of fraud with particularity in accordance with Fed. R. Civ. P. 9(b). Asian and Western Classics B.V. v. Lynne Selkow, 92 USPQ2d 1478 (T.T.A.B. 2009). Under Rule 9(b), the pleadings must contain explicit rather than implied expression of the circumstances constituting the fraud. Id., quoting King Automotive, Inc. v. Speedy Muffler King, Inc., 667 F.2d 1008, 212 USPQ 801, 903 (CCPA 1981). Finally, although Rule 9(b) allows that intent may be alleged

generally, the pleadings must allege sufficient underlying facts from which a court may reasonably infer that a party acted with the requisite state of mind. Asian and Western Classics, 92 USPQ2d at 1479, citing Exergen Corp. v. Wal-Mart Stores, Inc., 575 F.3d 1312, 1329 n.5, 91 U.S.P.Q.2d 1656 (Fed Cir. 2009).

2. The Fraud Claims Should be Dismissed for Failure to State a Claim and/or For Failure to Meet the Requirements of Rule 9(b)

Petitioner's claim that Registrant committed fraud because it knew that Petitioner had the right to use the TOP GUN mark is nothing more than a thinly-veiled claim of priority, at best, which Petitioner knows it is legally barred from asserting. Fraud is not a failsafe for those who miss the boat on priority. In any event, Petitioner's allegations of fraud should be dismissed because they are entirely lacking in factual support, implausible on their face, do not raise a right to relief above the speculative level, and fail to meet the heightened pleading requirements of Rule 9(b).

a. The Fraud Claim Pertaining to the Trademark Application Should be Dismissed

Petitioner's claim that Registrant committed fraud when filing the application for the TOP GUN mark, on the grounds that it allegedly knew that Petitioner had the right to use such mark, is positively specious, in view of Petitioner's admission that the only lawful basis upon which it used the mark was pursuant to a license. Specifically, Petitioner admits that its right to use the TOP GUN mark derived from the license it was granted by Paramount (Petition ¶7). Petitioner goes on to allege that it continued to use the mark after such license "ended" (Petition ¶8). In view of such allegations, the claim of fraud is not plausible on its face, and should therefore be dismissed, since the alleged facts do not even support a claim that Petitioner had the right to use the TOP GUN mark, at the time that the application was filed, let alone that

Registrant knew that Petitioner had such a right and intended to deceive the Trademark Office. Indeed, the only reasonable inferences that can be drawn from such allegations are that Petitioner did not have the right to use the mark at the time the application was filed, and that any continued use of the mark by Petitioner after the license it was granted “ended” was unlawful.

Moreover, the fraud claim must be dismissed because the foregoing allegations directly contradict the allegation that Registrant knew that Petitioner had the right to use the mark. Indeed, accepting Petitioner’s allegations as true, as the Board must, Paramount had the right to use the mark, Paramount granted Petitioner the right to use the mark, and that right subsequently “ended.” Petitioner therefore did not have the right to use the mark and Registrant cannot be found to have known otherwise. The fraud claim should therefore be dismissed for this reason alone. See, e.g., Whittington v. United States, 2012 WL 2114970, * 3 (D.D.C.) (“Because plaintiff has directly contradicted certain of his claims with his factual allegations, those claims must be dismissed.”).

In any event, at a minimum, the allegations certainly do not form a sufficient basis for the Board to infer more than a mere possibility that Registrant knew that Petitioner had the right to use the TOP GUN mark. Indeed, the allegations are insufficient for the Board to do more than speculate as to whether or not Petitioner had any right to use the mark after the license ended. In short, while the Petition may sufficiently allege that Registrant knew that Petitioner was using the mark, there are no facts alleged that support the allegation that Registrant knew that Petitioner had a right to use the mark. The fraud claim should therefore be dismissed. See Ashcroft, 556 U.S. at 679, 129 S.Ct. at 1950 (“[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct,” dismissal is appropriate).

Additionally, Petitioner's failure to specify any facts as to how or why it had the right to use the mark, after the license from Paramount "ended," renders the fraud claim deficient under Rule 9(b). Petitioner fails to even allege whether or not Paramount's rights ended at all and, if they did, when they allegedly ended, how they allegedly ended, or why they allegedly ended. The Petition likewise fails to allege how any rights to the mark previously held by Paramount may have vested in Petitioner, or when. The Petition therefore certainly fails to allege any facts as to how Registrant knew or should have known those facts which the Petition itself fails to identify. Such failures clearly render the claim of fraud defective under Rule 9(b).

Indeed, Petitioner has failed to even set forth a claim of priority of use, and it therefore cannot be found to have set forth a claim that Registrant knowingly made a false material representation, with an intent to deceive, based on such alleged priority of use. Petitioner's allegations simply do not meet the notice requirements that underlie the heightened pleading requirements of Rule 9(b). Similarly, the allegation that Registrant should have known that Petitioner acquired and/or owned rights in the TOP GUN mark fails, since Petitioner has itself failed to identify the particular facts that it alleges Registrant should have known.

Furthermore, in paragraph 13, Petitioner alleges that Hod knew that Petitioner had been using the mark TOP GUN in commerce in connection with IC25 goods and that such use preceded Registrant's first use of the mark TOP GUN on or in connection with IC25 goods. This allegation fails in a number of respects. First, the general allegation of IC25 goods is insufficient under both Rule 8 and Rule 9(b). Even under Rule 8, if the petition were based on prior use, the identification of the goods on which the mark was used, and particularly the goods on which the mark was allegedly used prior to Registrant's use, must be alleged. In short, the notice requirement under Rule 8 is simply not met.

Likewise, the specificity requirements for a claim of fraud are clearly not met. Petitioner is alleging that Registrant knew that Petitioner had prior use of the mark, yet Petitioner itself does not even identify the specific goods on which it allegedly used the mark. The claim is also devoid of any allegations as to when Petitioner allegedly used the mark, or the manner in which used the mark. Essentially, facts supporting a claim that the words TOP GUN were used by Petitioner as a trademark are entirely missing. If Petitioner is unable to do that, it should not be permitted to assert a claim that Registrant knew that Petitioner allegedly had used TOP GUN as a trademark first. These are precisely the type of unsupported allegations that are prohibited with respect to claims of fraud.

b. The Fraud Claims Based on the Section 8 and 15 Declarations Must Also be Dismissed

Petitioner alleges that the Declaration of Use filed by Registrant on September 10, 2009 was false because the mark was not in use on or in connection with all of the goods listed in the registration. The only allegation in support of this claim is paragraph 25 of the Petition, which alleges “[u]pon information and belief, on September 10, 2009, all of the Listed Goods were not in use in commerce.” This allegation is completely inadequate to meet the pleading requirements of Rule 9(b). Not a single fact is alleged supporting Petitioner’s alleged “belief” that the mark was not used on all of the goods covered by the registration, let alone that Registrant acted with fraudulent intent. Indeed, Petitioner fails to even identify which goods in connection with which Registrant was allegedly not using the mark at that time. In accordance with Asian and Western Classics, 92 USPQ2d at 1478, this claim must therefore be dismissed.

Furthermore, even if the allegation that the mark was not used on all of the goods is accepted as true, the fraud claim still fails, since a false statement alone is insufficient to set forth a claim of fraud, In re Bose Corporation, 580 F.3d 1240, 91 USPQ2d 1938 (Fed. Cir. 2009), and

the Petition is devoid of any facts from which an intent to deceive may reasonably be inferred. The claim therefore fails to meet the requirements of Rule 9(b) for this reason as well. See Id; Exergen, 575 F.3d at 1328-29, 91 USPQ2d 1656.

Likewise, with respect to the Declaration of Incontestability, Petitioner alleges only that “[u]pon information and belief, on September 10, 2009, the mark had not been continuously used in commerce for five (5) consecutive years after the date of registration on or in connection with all the Listed Goods” (Petition ¶31). Once again, not a single fact is alleged supporting the purported “belief” and Petitioner again fails to even identify which of the goods covered by the registration the mark was allegedly not used with for five years. Further, even if were a basis for alleging that the declaration is false, the Petition is again devoid of facts which could support a reasonable inference of deceptive intent. Therefore, this fraud claim likewise fails to meet the heightened pleading requirements of Rule 9(b) and, in accordance with Asian and Western Classics, 92 USPQ2d at 1478, must be dismissed.

3. The Claim That the Mark TOP GUN is Generic Should be Dismissed

The alternative claim for cancellation on the grounds that the mark TOP GUN is generic fails, as a matter of law, as it is not plausible on its face. Accepting all facts as alleged to be true, for the purposes of this motion, the pleading fails because Petitioner’s claim that the mark is generic is directly contradicted by its admission that its own use of the term TOP GUN was as a trademark (Petition ¶¶7 and 8). Claims contradicted by the facts alleged in the pleading itself are patently implausible.

Specifically, while Petitioner alleges that “[a]s a result of Paramount Picture’s Top Gun movie and the commercial efforts of Petitioner and others, the term “Top Gun” has become synonymous with flight jackets” and has therefore “become generic” (Petition ¶34), this

conclusory allegation is flat out contradicted by Petitioner's allegations that its use of TOP GUN was pursuant to a license from Paramount (Petition ¶7), and that, after the license from Paramount ended, it continued to use TOP GUN as a trademark (Petition ¶8). Thus, Petitioner has admitted that its own use of the term TOP GUN was a trademark use, and its claim that such term is generic for leather jackets is therefore contrary to other allegations set forth in the Petition and must be dismissed. See, e.g., Whittington, 2012 WL 2114970 at * 3 ("Because plaintiff has directly contradicted certain of his claims with his factual allegations, those claims must be dismissed.").

The generic claim also fails to state a claim because Petitioner has failed to alleged facts sufficient to support the claim. It is well settled that generic terms are words or phrases that the relevant purchasing public understands primarily as the common or class name for the goods. In re Dial-A-Mattress Operating Corp., 240 F.3d 1341, 57 USPQ2d 1807, 1811 (Fed. Cir. 2001). Here, the Petition does not include any allegations that purchasers of leather jackets, of any type, understand the term TOP GUN to be the common or class name of leather jackets, or even of "military styled flight jackets, including the 'G-1' jacket, a leather jacket with a fur collar." (Petition ¶5). Likewise, even if such a conclusory allegation were included in the Petition, the claim would still fail, since there are no facts alleged upon which such a conclusory allegation could be reasonably supported. Indeed, the Petition simply fails to address the purchasers of leather jackets at all.

Rather, read in the light most favorable to Petitioner, the Petition alleges, at most, that "Top Gun is the colloquial term for the United States Navy Strike Fighter Tactics Instructor program," that "the term became popular as a result of the Paramount Pictures' movie entitled 'Top Gun,' starring Tom Cruise," and that Cruise and others "wore G-1 jackets with patches

similar to the G-1 jackets worn by pilots in the Navy's Top Gun program" (Petition ¶6). Such allegations make no reference whatsoever to purchasers of leather jackets, or even of military styled leather jackets, such as the G-1 jacket, let alone any reference to what such purchasers understand by the term TOP GUN. Instead, the claim that the mark is generic is based solely on Petitioner's own – contradictory -- activities, and the unspecified activities of other unspecified sellers of military styled leather jackets. For this reason alone, the claim fails and must be dismissed.


Finally, even accepting these alleged facts as true, for the purposes of this motion, they do not form a sufficient basis for the Board to infer more than the mere possibility that the TOP GUN mark is generic for such goods. The claim should therefore be dismissed for this reason as well. See Ashcroft, 556 U.S. at 679, 129 S.Ct. at 1950 ("[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," dismissal is appropriate).

4. Conclusion

For the foregoing reasons, both the fraud claims and the claim that the mark is generic should be dismissed for failure to state a claim upon which relief can be granted. In short, the claims simply fail as a matter of law.

Dated: November 26, 2012

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CERTIFICATE OF SERVICE

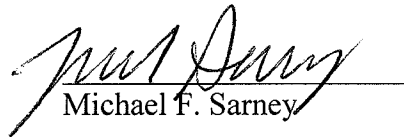
I, the undersigned, Michael F. Sarney, hereby certify that, on the 26th day of November, 2012, I caused to be served a true and correct copy of:

REGISTRANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND BRIEF IN SUPPORT THEREOF

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